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Supreme Court, U.S.
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No. 08-1548

In the

Supreme Court of the United States

BUSINESS PLANNING SYSTEMS, INC.,

Petitioner,

– v. –

PERSONNEL DECISIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED

1. Did the Delaware Courts commit clear error when they found "overwhelming" evidence that the parties had agreed that the Delaware Uniform Arbitration Act would govern their transaction?

2. Did the Delaware Courts commit clear error when they held that BPS was estopped from reversing its prior position that the Delaware Uniform Arbitration Act governed the parties' transaction?

CORPORATE DISCLOSURE STATEMENT

Respondent Personnel Decisions, Inc. has no parent corporation. No publicly held corporation owns 10% or more of PDI's stock.

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STATEMENT OF THE CASE

Respondent, Personnel Decisions, Inc. ("PDI"), develops and sells a series of pre-employment screening tests that, prior to June of 1998, were administered in paper and pencil form. On or about June 15, 1998, PDI and Petitioner, Business Planning Systems, Inc. ("BPS"), entered into a Development and Marketing Agreement (the "Agreement") whereby BPS promised, among other things, to develop, maintain and improve computer software for the purpose of administering, scoring and presenting the results of the Employment Tests. (A41-42).

The Agreement provided that: "[t]he validity, construction, and performance of this agreement will be governed by the laws of the state of Delaware." (A41). It further provided for the arbitration of any dispute between the parties:

> PDI and BPS agree that any dispute that cannot be amicably resolved within 30 days will be submitted to and resolved by arbitration. In this event, the parties will agree upon a neutral arbiter who has significant experience with software issues, or will request that an appropriate neutral arbiter be selected from a list of qualified individuals by the American Arbitration Association. Any decision of the arbiter will be binding and shall be enforceable by a court of competent jurisdiction.

(A40-41).

On or about March 19, 2003, counsel for BPS wrote to counsel for PDI, alleging that PDI had breached the Agreement nearly three years earlier, in May

2000. In that same letter, BPS enclosed a Notice of Intention to Arbitrate its claims against PDI, and specifically cited to 10 *Del. C.* § 5703(c) to invoke the application of the Delaware Uniform Arbitration Act ("DUAA"). (A7-8).

After exchanging correspondence, on July 1, 2003, BPS sent PDI a second Notice of Intention to Arbitrate, which again specifically cited to and invoked the operation of the DUAA. On or about July 15, 2003, PDI, through its counsel, wrote BPS and denied that PDI had breached the Agreement. Despite PDI's explicit rejection of BPS' claims, and corresponding refusal to negotiate settlement, BPS did not timely file a Demand for Arbitration at any time in 2003. In fact, BPS did nothing for the next four years. (A9-10).

Four years later, on August 10, 2007, BPS filed a Demand for Arbitration (the "Demand") pursuant to paragraph 23 of the Agreement. (A39-46). In the Demand, BPS alleged that Delaware law governed the parties' dispute and explicitly demanded "an arbitration hearing at a convenient location in Delaware." (A41, emphasis added). The AAA cover sheet BPS served with its Demand likewise listed "Delaware" as the hearing locale.

Because BPS's seven-year-old contract claims were ostensibly barred by the statute of limitations, PDI sought an Order from the Court of Chancery, pursuant to 10 *Del. C.* §§ 5702 and 5703(b) of the DUAA, to enjoin BPS from arbitrating those claims. The original issue put before the Court of Chancery was whether PDI would be prohibited from seeking to enjoin the arbitration of these claims by 10 *Del. C.*

§ 5703(c). (*See* Petition at 8). The question then posed was one of state statutory construction; *i.e.*, whether the claims in the Notices were time-barred.

Both parties fully briefed that issue, and neither party raised any question concerning jurisdiction and/or the applicability of the DUAA. Before those issues were decided, however, on February 6, 2008, the Court of Chancery raised the applicability of the DUAA *sua sponte* and directed supplemental briefing. (A16-17).

After supplemental briefing and oral argument were completed, on May 5, 2008, the Court of Chancery issued its Memorandum Opinion. In that well-reasoned decision, the Court of Chancery held both that the parties' course of performance conclusively established the applicability of the DUAA via mutual consent and that BPS was estopped from denying it. (A14-17).

Rather than pursuing interlocutory review, BPS intentionally defaulted on the merits, consenting to the entry of a permanent injunction on the ground that its arbitration claims were time-barred. It then appealed on jurisdictional grounds. Its appeal was unsuccessful. By Order dated March 17, 2009, the Supreme Court of the State of Delaware affirmed the judgment of the Court of Chancery "on the basis of its analysis of the parties' course of conduct, and its analysis of the relevant statutes, as set forth in the Memorandum Opinion dated May 5, 2008." (A1).

BPS now petitions for a Writ of Certiorari on two grounds: (a) first, that "[t]he Supreme Court of Delaware's decision conflicts with *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Preston v. Ferrer*, Ferrer, __ U.S. __, 128 S. Ct. 978 (2008)"; and (b)

second, that "the balance of equities test engaged in by the Chancery Court conflicts with the broad mandate of the FAA and ignores Respondent's remedy at law." (*See* Petition at 9, 14.) Neither argument is correct, nor appropriate for review by this Court, and so the Petition should be denied.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides in relevant part that: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." That is the only type of error that BPS is asserting here. Its Petition should be denied.

I. THE COURT OF CHANCERY AND DELAWARE SUPREME COURT APPLIED FEDERAL LAW CORRECTLY

There is no dispute in this case as to the operative rule of law. The Court of Chancery correctly held that: "parties may contract to apply state procedural law instead of the FAA, but, to protect the interests served by the FAA, courts will honor that preference only if the parties 'clearly evidence their intent to be bound by such rules.'" (A-20, *citing, inter alia, Sovak v. Chugai Pharm Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995); *Volt Info. Scis., Inc., v. Bd. of Trs.*, 489 U.S. 468 (1989)). BPS admits that this is the correct FAA preemption standard. (*See* Petition at 9-10).

However, BPS argues that the Court of Chancery, and then the Delaware Supreme Court, applied the foregoing standard incorrectly when those Courts found: "'clear[] evidence' that the parties here intended the DUAA to govern their agreement." (A1,20-21). BPS disagrees with the Court's factual finding, arguing that "under the facts of this case ... there is no clear and unequivocal assent by the parties to eschew the FAA in favor of the DUAA." (*See* Petition at 13). BPS would therefore like this Court to review the Court of Chancery's factual findings *de novo*. Such a request plainly falls outside Supreme Court Rule 10 and should be denied.

Realizing this, BPS attempts to reframe the issue as something other than what it is. First, it generically claims that the Delaware Supreme Court's decision "conflicts with" this Court's decisions in *Southland Corp.* and *Preston*. (*See* Petition at 9). BPS, however, never explains <u>how</u> these decisions are in conflict. That is because they are not.

In *Southland Corp., supra*, this Court found that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, creates "a substantive rule applicable in state as well as federal courts." 465 U.S. at 16. No one disputes this, just as no one disputes that parties – such as BPS and PDI here – may agree to apply state arbitration rules even if such rules are inconsistent with those set forth in the FAA. *See Volt Info. Scis., Inc., v. Bd. of Trs.*, 489 U.S. 468, 479, (1989). The test, as explained in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995), is whether the parties clearly evidenced their intent to be bound by such rules. Here, the Court found "overwhelming" evidence that BPS and PDI did just that.

Preston, supra, is not to the contrary. In that case, unlike here, there was no evidence – let alone "overwhelming" evidence – that the parties agreed to have the conflicting state statute, the California Talent Agencies Act ("TAA"), govern their transaction in place of the FAA. 128 S.Ct. at 927. Rather, the issue was whether that statute inherently trumped the FAA. *Id.* This Court ruled it did not. *Id.* at 989. Because this Court's decision in *Preston* did not address the issue of whether the parties agreed by their words or conduct that state law would apply, *Preston* has no application to the facts of this case, in which the Court found that such an agreement was reached. (A20-21).

In sum, this is not a dispute about which legal standard is proper, but rather whether the Delaware Courts properly applied the agreed-upon legal standard. As set forth below, they did. Their factual findings should not be disturbed.

II. THE COURT OF CHANCERY AND DELAWARE SUPREME COURT CORRECTLY FOUND THAT THE PARTIES AGREED TO APPLY THE DUAA TO THEIR TRANSACTION

The Court of Chancery properly applied the Delaware Uniform Arbitration Act ("DUAA") for at least two separate reasons. First, as the Court of Chancery held, overwhelming evidence of the parties' course of performance established the mutual assent necessary to invoke the DUAA. Second, BPS was rightfully estopped from changing its position on the applicability of the DUAA to take unfair advantage of circumstances of its own making. (A2-38).

A. THE PARTIES AGREED TO APPLY THE DUAA

First, the Court of Chancery held that the parties' course of performance overwhelmingly establishes the mutual assent necessary to invoke the application of the DUAA. This holding is correct.

Evidence of mutual assent to arbitrate pursuant to the DUAA is found in, *inter alia*, the following undisputed facts of record: (i) first and foremost, that BPS filed two notices of intent to arbitrate which provided written notice to PDI pursuant to 10 *Del. C.* § 5703; (ii) that the formal demand for arbitration BPS filed with the American Arbitration Association ("AAA") designated Delaware, and only Delaware, as the hearing locale; and (iii) that the Agreement upon which the arbitration is based states that the validity, construction and performance of that agreement will be governed by Delaware law. (*See* Petition at 7-8; A41). This evidence, viewed cumulatively and under the totality of circumstances, best expresses the parties' mutual assent to arbitrate under the DUAA.

It is undisputedly the rule that "under § 5702(a) it is the parties' agreement to arbitrate in Delaware that confers jurisdiction on this Court over cases arising under the DUAA." *Dresser Indus., Inc. v. Global Indus. Technologies,* Inc., 1999 WL 413401, *3 (Del. Ch. Jun. 9 1999) (emphasis added) (*citing SBC Interactive, Inc. v. Corporate Media Partners*, 1998 WL 749446, *3 (Del. Ch. Oct. 17, 1998), *Gen. Elec. Co. v. Star Tech., Inc.*, 1996 WL 377028, *6 (Del. Ch. July 1, 1996)). As explained in *Star Technologies*, "the present interpretation of the Act is consistent with interpretations in other states where Courts

have ruled that, for a court to obtain jurisdiction to confirm or vacate an award, the parties must either provide in their written agreement for arbitration in that state or, by common assent, actually arbitrate the matter in that state." *Id.* at *5 (emphasis added).

BPS's arguments to the contrary are erroneous. BPS asserts that the Court of Chancery erred by not giving enough weight to a presumption in favor of the FAA. Specifically, BPS argues that the reference in the arbitration clause to the AAA's rules for selecting an arbitrator favors just such a presumption. (*See* Petition at 12-13.) That is not correct. The clause does not refer to any rules, let alone those adopted by the AAA. Instead, the clause gives the parties an option of selecting arbitrators from a list of qualified individuals under the AAA. As the Court found, that optional proviso does not constitute a wholesale adoption, explicit or implicit, of AAA rules for arbitration. (A5 at n.2).

B. BPS WAS RIGHTFULLY ESTOPPED FROM CHANGING POSITIONS

The Court of Chancery rightfully (and alternatively) estopped BPS from changing positions on the exercise of jurisdiction. As the Court found:

> When it invoked the DUAA in the First Notice, Business Planning sought to ascertain whether Personnel Decisions would seek to challenge the validity or performance of the Development Agreement and whether Personnel Decisions would argue that any then-existing claims were barred by the statute of limitations. Otherwise, Business Planning threatened that Personnel Decisions would not have the right to

> challenge them in court. Aside from the benefits Business Planning received from its offensive use of § 5703(c) of the DUAA, its invocation of that statute caused a material detriment to Personnel Decisions. In reliance on Business Planning's consistent invocation of the DUAA, Personnel Decisions filed suit on a theory unique to the DUAA and researched and prepared several briefs to the court on terms of the DUAA, all for a proceeding with a limited scope.
>
> Similarly, the equities do not favor Business Planning. It had full knowledge of all relevant facts necessary to make a determination of the DUAA's application during the period 2003 to 2007. Its self-interested 180 degree turn is graceless.

(A22-23).

Tellingly, BPS does not challenge that doctrine anywhere in its submission. Nor could it. The estoppel doctrine is well-established. All it requires is proof that BPS changed positions in the litigation to gain an advantage. *See Albertson v. Winner Auto.*, 2004 WL 2435290, *4 (D. Del. Oct. 27, 2004) (citations omitted). BPS cites no case law holding that FAA preemption is an unwaiveable argument, because no such case law exists.

Further, the trial court properly balanced the equities as it is required to do in connection with weighing an award of a preliminary injunction. *See e.g., In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 190 (Del. Ch. 2007). The potential to raise a statute of limitations defense in any subsequent arbitration is not a legal (as opposed to equitable) remedy. It is an affirmative defense, and no more.

BPS cites no authority to establish any contrary proposition, and none exists. More to the point, "[t]he essential relief sought in [this] action was an injunction, exclusive jurisdiction of which is vested in the Court of Chancery." *City of Rehoboth Beach v. Capasso*, 1986 WL 10500, *3 (Del. Ch. Sept. 22, 1986).

In short, the Court of Chancery's application of the estoppel doctrine to prevent BPS from repudiating the DUAA, after it had repeatedly and expressly invoked that very statute, violates no Federal law or policy. The Court acted within its inherent equitable authority, and such authority should not be disturbed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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